



Peter Mabuka alias Orucho Osugu v Richard Omare Murega sued as administrator of the Estate of the late Eresta Mongina Murega (Civil Application E134 of 2021) [2022] KECA 113 (KLR) (11 February 2022) (Ruling)

Neutral citation: [2022] KECA 113 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT KISUMU
CIVIL APPLICATION E134 OF 2021
F TUIYOTT, JA
FEBRUARY 11, 2022**

BETWEEN

PETER MABUKA ALIAS ORUCHO OSUGU APPLICANT

AND

RICHARD OMARE MUREGA SUED AS ADMINISTRATOR OF THE ESTATE OF THE LATE ERESTA MONGINA MUREGA RESPONDENT

(Being an application for leave to lodge a notice of appeal out of time against the whole of the Ruling (J. M. Onyango, J) delivered on 28th July, 2021 in KISII ELC CASE NO. 183 OF 2017)

RULING

- [1] Before Court is a Notice of Motion dated 11th September, 2021 in which the applicant seeks that the Court be pleased to extend time or grant leave for the lodging of a Notice of Appeal against the Ruling of the J. M. Onyango, J delivered in Kisii Environment and Land Court (ELC) on 28th July, 2021.
- [2] The applicant who was a defendant in ELC sought to have his counter claim amended and mounted an application dated 18th January, 2021 seeking leave to do so. In the Ruling, the ELC dismissed the said application with costs to the respondent. In an affidavit in support of the application before Court, counsel for the applicant, Herbert Nyamurongi, deposes that by an inadvertent mistake on his part, his office did not review the matter and therefore failed to lodge the Notice of Appeal on time. He states that he only discovered this failure on or about 20th August, 2021 when the Applicant called his office seeking an update of his case. Counsel then applied for a copy of a Ruling vide a letter dated 20th August, 2021 and obtained it on 24th August, 2021.
- [3] The respondent did not file a replying affidavit to that application but put in written submissions. I have considered them and those of the applicant.



[4] The power of this Court to extend time of the filing of notice of appeal reposes in Rule 4 of the *Court of Appeal Rules*:

“The Court may, on such terms as it thinks just, by order extend the time limited by these Rules, or by any decision of the Court or of a superior court, for the doing of any act authorized or required by these Rules, whether before or after the doing of the act, and a reference in these Rules to any such time shall be construed as a reference to that time as extended.”

[5] The principles, generally, applicable for extension of time have been set out by the Supreme Court in the decision of *Nicholas Kiptoo Arap Korir Salat vs. The Independent Electoral and Boundaries Commission & 7 Others [2014] eKLR* as follows: -

“From the above caselaw, it is clear that the discretion to extend time is indeed unfettered. It is incumbent upon the applicant to explain the reasons for delay in making the application for extension and whether there are any extenuating circumstances that can enable the Court to exercise its discretion in favour of the applicant.

This being the first case in which this Court is called upon to consider the principles for extension of time, we derive the following as the under-lying principles that a Court should consider in exercise of such discretion:

1. Extension of time is not a right of a party. It is an equitable remedy that is only available to a deserving party at the discretion of the Court;
2. A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court
3. Whether the court should exercise the discretion to extend time, is a consideration to be made on a case to case basis;
4. Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the Court;
5. Whether there will be any prejudice suffered by the respondents if the extension is granted;
6. Whether the application has been brought without undue delay; and
7. Whether in certain cases, like election petitions, public interest should be a consideration for extending time.”

[6] Rule 75(1) of the rules requires a person who desires to appeal to this Court to give a Notice, in writing, and lodge it with the register of the Superior Court within fourteen days of the date of the decision. The decision here was delivered on 28th July, 2021 so the Notice of Appeal ought to have been lodged by 12th August, 2021.

[7] The first step taken by the applicant to effect his intention to appeal the decision was when his counsel wrote a letter dated 20th August, 2021 seeking a copy of the ruling. The letter was then filed on 24th August, 2021. This would be 12 days after deadline for filing of the notice.

[8] The current application was then made on 11th September, 2021. This would be after another 17 days or so after counsel had obtained a copy of the ruling on 25th August, 2021. The request for extension



is therefore brought about 30 days after the deadline for lodging of the Notice of Appeal. This is not excessive delay.

- [9] What reasons are given for this delay? It is explained by counsel for the applicant that immediately after delivery of the ruling, the ELC set down the main suit for further hearing on 9th March, 2022 and directed that a hearing notice be served upon the respondent's advocates who were absent from court. That his staff got into the business of issuing and serving the notice which happened on 5th August, 2021 and so the file was not reviewed.
- [10] This is an explanation that is accepted by this Court because human failing is part of life. The delay of 30 days is not inordinate and the explanation given is not unreasonable. In doing so, I bear in mind that while not all mistakes on the part of counsel will be overlooked by the Court, some will be and this will depend on the circumstances of each case (see *Abdulkadir Athman Salim Elkindy v Director of Public Prosecutions & another* [2018] eKLR). Where, like here, it was the party who prompted counsel into action, then the mistake of counsel should not be allowed to prejudice his client. This is also considered in light that the delay is not inordinate. Lastly, while it is not for me to prejudice the strength of the intended appeal, the court hearing the appeal will be invited to discuss whether the trial court correctly applied the well settled parameters in refusing to grant leave to amend. That may well be an arguable point.
- [11] I exercise my discretion and allow the Notice of Motion dated 11th September, 2021. Leave be and is hereby granted extending the time for the applicant to file and serve the Notice of Appeal. The Notice of Appeal is to be filed and served within 14 days of the date of this Ruling. Costs shall abide the intended appeal.

DATED AND DELIVERED AT KISUMU THIS 11TH DAY OF FEBRUARY, 2022.

F. TUIYOTT

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed

DEPUTY REGISTRAR

